SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 456.

THE BALTIMORE & OHIO RAILROAD COMPANY,
APPELLANT,

vs.

INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

REPLY BRIEF FOR APPELLANT.

JOHN G. JOHNSON,
FREDERIC D. McKENNEY,
For Appellant.

HUGH L. BOND, JR.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 456.

THE BALTIMORE & OHIO RAILROAD COMPANY,

APPELLANT,

vs.

INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

REPLY BRIEF FOR APPELLANT.

It was declared by the Congress in the first section of the "Hours of Service Law" of March 4, 1907 (34 Stats. L., 1415, chap. 2939), that the provisions of the act should apply to ANY common carrier, its officers, agents, and employees "engaged in the transportation of passengers or property by railroad in the District of Columbia * * * or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, * * *;" that the term "railroad," as used in the act, should include ALL bridges and ferries used or operated in connection with ANY railroad, and "ALL the road in use by ANY common carrier operating a railroad," and that the term "employees" as

used in the act should be held to mean PERSONS actually engaged in or *connected* with the movement of ANY train.

While the first sentence of the first section of this act apparently restricts the application of the act to common carriers actually engaged in the transportation of passengers or property by railroad in the District of Columbia, the Territories, and in interstate commerce, it will be immediately noticed that the definitions of the terms "railroad" and "employees," which occur in the second sentence of said section, are not only broad enough but are also specific enough to include intrastate, as well as interstate, "railroads" and "employees," *e. g.,* "all bridges and ferries used or operated in connection with *any* railroad," and "all the road in use by *any* railroad," and persons actually engaged in or connected with the movement of *any* train.

The first sentence of section two of the act declares it to be "unlawful for *any* common carrier, its officers or agents, *subject to this act,* to require or permit *any employee subject to this act* to be or remain on duty" for a longer period than is prescribed, *provided* that "no operator, train dispatcher," etc., "shall be required or permitted to be or remain on duty" for a longer period than is prescribed for such employees.

The first sentence of section three of the act declares "that *any such* common carrier, or any officer or agent thereof, requiring or permitting *any employee* to go, be, or remain on duty in violation" of the second section of the act, shall be liable "to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be instituted by the proper United States district attorneys."

In "The Employers' Liability Cases" (207 U. S., 463), the act of Congress under discussion related to "every common carrier engaged in trade or commerce in the District of Columbia * * * or between the several States, or be-

tween any * * * Territory or Territories and any State or States, or the District of Columbia, or with foreign nations," etc., and made such common carrier liable to "*any* of its employees," etc.

After declaring (p. 495) that there was—

> "no just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject *are solely confined to interstate commerce*, and therefore are within the grant to regulate that commerce or within the authority given to use all means appropriate to the exercise of the powers conferred,"

this court, referring to certain contentions of counsel, said (p. 496):

> "But it is argued, even though it be conceded that the power of Congress may be exercised as to the relation of master and servant in matters of interstate commerce, that power cannot be lawfully extended so as to include the regulation of the relation of master and servant, or of servants among themselves, as to things which are not interstate commerce. From this it is insisted the repugnancy of the act to the Constitution is clearly shown, as the face of the act makes it certain that the power which it asserts extends not only to the relation of master and servant and servants among themselves as to things which are wholly interstate commerce, but embraces those relations as to matters and things domestic in their character and which do not come within the authority of Congress. To test this proposition requires us to consider the text of the act.
>
> "From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines,

etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that any one who conducts such business be a 'common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States,' etc. That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the States, etc. From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the States, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do—that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce.

"And the conclusion thus stated, which flows from the text of the act concerning the individuals or corporations to which it is made to apply, is further demonstrated by a consideration of the text of the statute defining the servants to whom it relates.

"Thus the liability of a common carrier is declared to be in favor of 'any of its employees.' As the word 'any' is unqualified, it follows that liability to the servant is coextensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employees of all carriers who engage in interstate commerce. This also is the rule as to the one who otherwise would be a fellow-servant, by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from 'the negligence of any of its officers, agents or employees.'

"The act then being addressed to all common car-

riers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where although a common carrier is engaged in interstate commerce such carrier may in the nature of things also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a State. Take again the same road having shops for repairs, and it may be for construction work, as well as a large accounting and clerical force, and having, it maybe, storage elevators and warehouses, not to suggest besides the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line moving wholly within a State as to a large part of its business and yet as to the remainder crossing the State line.

"As the act thus includes many subjects wholly beyond the power to regulate commerce and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved.

"On the one hand, while conceding that the act deals with all common carriers who are engaged in interstate commerce because they so engage, and indeed, while moreover conceding that the act was originally drawn for the purpose of reaching all the employees of railroads engaged in interstate commerce to which it is said the act in its original form

alone related, it is yet insisted that the act is within the power of Congress, because one who engages in interstate commerce thereby comes under the power of Congress as to all his business and may not complain of any regulation which Congress may choose to adopt. These contentions are thus summed up in the brief filed on behalf of the Government:

" 'It is the *carrier* and not its employees that the act seeks to regulate, and the carrier is subject to such regulations because it is engaged in interstate commerce.

* * * * * * *

" 'By engaging in interstate commerce the carrier chooses to subject itself and its business to the control of Congress, and cannot be heard to complain of such regulations.

" '* * * It is submitted that Congress can make a common carrier engaged in interstate commerce liable to *any one* for its negligence who is affected by it; and if it can do that, necessarily it can make such carrier liable to all of its employees.'

"On the other hand, the same brief insists that these propositions are irrelevant, because the statute may be interpreted so as to confine its operation wholly to interstate commerce or to means appropriate to the regulation of that subject, and hence relieves from the necessity of deciding whether, if the statute could not be so construed, it would be constitutional. In the oral discussion at bar this latter view was earnestly insisted upon by the Attorney General. Assuming, as we do, that the propositions are intended to be alternative, we disregard the order in which they are pressed in argument, and therefore pass for a moment the consideration of the proposition that the statute is constitutional, though it includes all the subjects which we have found it to embrace, in order to weigh the contention that it is susceptible on its face of a different meaning from that which we have given it, or that such result can be accomplished by the application of the rules of interpretation which are relied upon.

"So far as the face of the statute is concerned, the argument is this, that because the statute says carriers

engaged in commerce between the States, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business and none other of such carriers, and that the words 'any employee' as found in the statute should be held to mean any employee when such employee is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it. But if we could bring ourselves to modify the statute by writing in the words suggested the result would be to restrict the operation of the act as to the District of Columbia and the Territories. We say this because immediately preceding the provision of the act concerning carriers engaged in commerce between the States and Territories is a clause making it applicable to 'every common carrier engaged in trade or commerce in the District of Columbia or in any Territory of the United States.' It follows, therefore, that common carriers in such Territories, even although not engaged in interstate commerce, are by the act made liable to 'any' of their employees, as therein defined. The legislative power of Congress over the District of Columbia and the Territories being plenary and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the Territories, if standing alone, could not be questioned. Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested; that is, by causing the act to read 'any employee when engaged in interstate commerce,' we would restrict the act as to the District of Columbia and the Territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy.

"The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may

be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. *Illinois Central Railroad v. McKendree*, 203 U. S., 514, and authorities there cited.

"As the act before us by its terms relates to every common carrier engaged in interstate commerce and to any of the employees of every such carrier, thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate.

* * * * * * *

"3. It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of com-

merce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures.

* * * * * * *

"Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and non-enforcible; and the judgments below are, therefore,

"Affirmed."

By parity of reasoning the very "objection which was held fatal to the Employers' Liability Act, namely, that the act applied in cases where no interstate commerce [business] was involved," must also be held fatal to the Hours of Service Law.

The prohibitions of this law, as were the provisions and benefits of that, are "addressed to the individuals or corporations who are engaged in interstate commerce and is (are) *not confined solely* to regulating the interstate commerce business which such persons may do—that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce."

According to the very words of the statute it is unlawful for *any* common carrier, its officers or agents, "subject to this act" to require or permit *any* employee "subject to this act to be or remain on duty for a longer period," etc.

Every common carrier who may be engaged in the interstate transportation of passengers or property by railroad and every officer, agent, and employee of such carrier is, by the provisions of the act, made "subject" to its terms, and to its prohibitions, and this irrespective of whether the particular "railroad," "bridges," or "ferries" in use at the particular time by such common carrier are being employed or used in the conduct of its interstate business or not; and so the "employees" of such common carrier who are both within the terms of its protection and of its prohibition are *all* persons or *any* person who may be "actually engaged in or connected with the movement of ANY train," irrespective of whether their duties in connection with the movement of such train or trains cause them to be connected or concerned with the movement or conduct of interstate commerce business or not. As said in the Employers' Liability Cases, *supra:*

> "The statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons (or corporations) may do—that is, it regulates the persons because they engage in interstate commerce and *does not alone regulate* the business of interstate commerce."

This objection is and must be fatal to the validity of the statute under discussion whether viewed in either of the two aspects in which it is presented in appellee's brief, *i. e.*, A (Brief, p. 18), because it applies to *intrastate* trains, employees, and commerce as well as to *interstate* trains, employees, and commerce, and, B (Brief, p. 21), because without doing violence to the English language it cannot

rationally be construed so as to apply to and regulate the hours of work and rest of employees engaged in the movement of interstate trains only.

It is submitted with confidence that the Hours of Service Law, like the Employers' Liability Law (of 1906), "whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation."

It inevitably results that this statute like that should be held to be repugnant to the Constitution of the United States and therefore to be non-enforceable.

If it were possible to construe the statute, so as to save it, as suggested by appellee under B (Brief, p. 21), that is, to so limit its general terms by construction as to make it apply only to employees engaged in or connected with the movement of interstate commerce trains, nevertheless the orders of the Commission which are here under consideration must fall, for they are not so limited.

Contrary to the assertion made under point II of appellee's brief (p. 28) to the effect "that the order is no wider than the Hours of Service Law itself," whether that act be construed as applying to all employees engaged about the movements of trains or only to employees engaged about the movement of interstate trains," we insist that said order of the Commission is wider than the requirements of the law itself when viewed in either aspect and however it may be construed.

The original instructions of the Commission are addressed to "all carriers subject to the provisions of" the act, that is, to all common carriers engaged in interstate commerce by railroad, and while they purported only to require all such carriers to report under oath within thirty days after the end of each month "all instances where employees subject to

said act," *i. e.,* "persons actually engaged in or connected with the movement of any train," "have been on duty for a longer period than that provided in said act," nevertheless such instructions also gave notice of the adoption of certain forms and required such carriers "to use and follow the said prescribed forms in making" such reports (R., 3). The original forms require the statement under oath by the official to whom "hours of service of employees engaged in or connected with the movement of trains is reported" to make "a full and true report" * * * "of *all such hours* of service and following periods of rest *of the aforesaid employees* of said company who were employed in excess of the statutory period or who had not the statutory period of rest," "together with the causes of excess service or lack of rest and the circumstances connected therewith and explanatory thereof."

This requirement clearly includes all "employees" being "persons engaged in or connected with the movement of *any* train," whether said train movement be connected with or related to interstate commerce or not, and what is more, it affirmatively requires the carrier to report as to the excess sevice or lack of rest, not only in cases in which the statute by its terms might be supposed to apply, but also in regard to cases which the terms of the act expressly exclude from its provisions and application, *i. e.,* cases "of casualty or unavoidable accident or the act of God," or "where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen," and to cases affecting "the crews of wrecking or relief trains."

The duty imposed upon the Interstate Commerce Commission by section 4 of the act is "to execute and enforce the provisions of this act," and the only powers even supposedly granted or extended to said Commission in and by the ex-

press terms of said section, are powers to be exercised "in the execution of this act."

To assume that the exercise of any such supposed powers in the execution of the act either authorizes or permits the Commission to require reports under oaths concerning cases of employees or crews of trains which are expressly excluded from the purview of the act would do violence to fundamental canons of statutory interpretation and application and would outrage the established bases of logic.

The amended instructions and forms notified to the carriers under date of August 15, 1908 (R., 14), are more objectionable, for in addition to assuming to direct that reports and records of hours of service of employees shall be made "to the secretary or similar officer of the reporting carrier," thus directly usurping the functions of the board of directors or perchance negativing the provisions of the company's by-laws in such regard, they require such officer to report "under oath," "*any* employee on duty in excess," etc., etc., and likewise to make similar report where "NO EMPLOYEE has been employed in excess of the time named in said act, and in case NO EMPLOYEE has gone on duty with less than the statutory period off duty."

It can hardly be contended with fairness that the bill of complaint "admits that the required report is not to go beyond the scope of the statute." On the contrary it is expressly averred by the bill that neither by the said act of March 4, 1907, above referred to, *nor by any* other act of the Congress of the United States, has the said Interstate Commerce Commission been vested with authority or power to require the making by your orator and other carriers of reports of the character called for, and *that as a consequence of such want of power and authority* the said order of the Commission is not a lawful one" (R., 6).

II.

Appellee declares (Brief, p. 30) that it deduces its claimed powers in this regard from section 12 of the Interstate Commerce Act of 1887 as amended February 10, 1891 (26 Stats. L., 743), and which as so amended is reproduced in the Act to Regulate Commerce of June 29, 1906 (34 Stats. L., 584), and from section 20 of the last-mentioned act.

This declaration greatly narrows the scope of the discussion. Conceding that under the provisions of section 12 the Commission has "authority to inquire into the management of the business of carriers subject to its provisions and is required to keep itself informed as to the method in which same is conducted, and has the right to obtain from such carriers full and complete information necessary to enable it to perform its duties and carry out the objects for which it was created, we would remark that the general contentions of the appellee as to the powers of the Commission under this section have heretofore received authoritative exposition at the hands of this court (Harriman and Kahn against the Interstate Commerce Commission, 211 U. S., 407; see our main brief, page 31, *et seq.*). Whatever of doubt might arise from the discussion *arguendo* in the course of the opinion of the court in that case, as to the power of the Commission to extort "reports" as distinguished from its supposed power to "extort evidence from a witness by compulsion" (subpœna), would seem to have been foreclosed by the solemn action of the Congress itself in such connection.

If it was thought that the Commission had power to extort either from carriers or their agents or officers, through the medium of demandable reports information upon which such agents or officers might be prosecuted or subjected to penalties or forfeitures for or on account of the transactions therein disclosed, why did the Congress deem it necessary to extend the immunity statutes "only to a natural person, *who in obedience to a subpœna*, gives testimony under oath

or produces evidence, documentary or otherwise, *under oath*" (Act of June 30, 1906, Pub. No. 389). And again, if under the provisions of section 12 the Commission had authority "to inquire into the management of the business of all common carriers subject to the act and, in order to keep itself informed as to the manner and method in which the same is conducted, it had power to get necessary, full and complete information" directly from the carrier by means of reports, why was it deemed necessary by the Congress to enact the statute of March 3, 1901 (31 tSat. L., 1445), "requiring common carriers engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission." The sole object and purpose of that statute was to make it the duty of the general manager or other proper officers of interstate commerce railroads to make monthly reports, "under oath" of all collisions of trains and of all accidents to its passengers or employees, while in its service and actually on duty, and to provide adequate punishment for failures in such regard. It is especially significant in this connection that section 3 of said act provides for the protection of the carrier making the report against any use which might be made of its contents.

With respect to section 20 of the Act to Regulate Commerce we say that the authority "to require from such carriers specific answers to all questions upon which the Commission may need information" relates solely to questions propounded in connection with the annual report, the general contents of which are outlined in much detail in the latter provisions of the section. That our contention in this regard is well founded clearly appears from the context and the form in which the terms of the section are cast.

The "special reports," which, under this section the Commission may require to be filed, "within a specified time," are clearly special reports of earnings and expenses which

the Commission may require in lieu of and not in addition to monthly reports of such. The authority conferred is not to require both monthly reports *and* special reports, but it is to require monthly reports *or* special reports in a specified time. Besides this court considering the provisions of this very section has already declared (Harriman, &c., *v.* Interstate Commerce Commission, *supra*), that "it is *directed solely to accounts* and returns."

The powers extended to the Commission by section 4 of the Hours of Service Law were those incident to its powers *to investigate* either upon complaint or possibly *suo motu;* together with all the attendant powers, upon notice, etc., to hear testimony, issue subpœnas, and the like.

It did not confer upon the Commission power to require even interstate commerce carriers engaged in transacting interstate commerce business to furnish men and the necessary money to enable them to collect, collate, and compile data, to formulate the same as prescribed, to make oath as to the verity of the results shown, as well as to the details upon which such results are founded, and then to forward the whole in the form of a report to the Commission to be used by it either as the basis of a reward for merit or the foundation of prosecutions for forfeitures or penalties.

JOHN G. JOHNSON,
FREDERIC D. McKENNEY,
For Appellant.

HUGH L. BOND, JR.,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE BALTIMORE AND OHIO RAILROAD Company, appellant,
v.
INTERSTATE COMMERCE COMMISSION, appellee.
} No. 456.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION, APPELLEE.

STATEMENT.

Only a few things need be mentioned here, as the general nature and facts of the case appear in appellant's brief.

The hours-of-service law, approved March 4, 1907 (34 Stat. 1415, c. 2939), follows in full:

> An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provisions

of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall

be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall

have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; *and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge.* In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided,* That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further,* That the provisions of this act shall not apply to the crews of wrecking or relief trains.

SEC. 4. *It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act.*

SEC. 5. That this act shall take effect and be in force one year after its passage.

I have italicized the parts on which the power of the Interstate Commerce Commission to make the order in question in this case directly depends.

Section 12 of the Interstate Commerce Act, as amended March 2, 1889 (25 Stat., 855), and February

10, 1891 (26 Stat., 743), and also section 20 of the Interstate Commerce Act, as amended June 29, 1906 (34 Stat., 584), are the special statutory provisions which are claimed directly to authorize the order which appellant assails; the grant of power to the Interstate Commerce Commission in those provisions being expressly extended to the commission in aid of its execution and enforcement of the hours-of-service law by the above-quoted provisions of section 4 of the latter statute. The pertinent parts of section 12 and section 20 of the Interstate Commerce Act as amended will be quoted in their proper connection in Point II of the argument.

ARGUMENT.

As the assignments of error are wholly general—that the demurrer to the bill should not have been sustained and that the bill should have been dismissed—and this brief is necessarily made in advance of the filing of appellant's brief, I am bound to consider all open points in the case, and so I shall treat the following propositions:

I. Congress has power to regulate the hours of service of employees of interstate carriers by railroad as it attempted in the hours-of-service law.

II. The hours-of-service law being valid, the Interstate Commerce Commission had statutory authority to make its order requiring monthly reports from common carriers of their practice in reference to the working and resting time of their employees engaged in or connected with the movement of trains.

III. The order of the commission does not transgress either the Fourth or the Fifth Amendment to the Constitution of the United States, because the required report is not an unreasonable search or seizure, and it does not unlawfully compel a common carrier or its employees to a self-incrimination.

IV. The claim that the order of the commission violates the Fourth or Fifth Amendment to the Constitution of the United States can not be entertained in this case, because no harm can come to appellant through its disclosure of the data which the commission seeks by the directed report unless appellant violates the hours-of-service statute, and a court of chancery certainly will not accord its aid to save a lawbreaker from discovery of his crime.

V. All questions raised by the bill could be made as effectually in defense of a suit to enforce obedience to the commission's order or in defense of a prosecution for violating the order; the bill is not supportable as a means of avoiding a multiplicity of suits; and there is no proper foundation for jurisdiction in chancery.

Of these—

I.

Congress has power to regulate the hours of service of employees of interstate carriers by railroad as it attempted in the hours-of-service law.

1. It is now beyond fair dispute that the power to regulate commerce includes power to pass laws

looking to the safety of the persons and property involved in that commerce.

Johnson v. *Southern Pacific Company* (196 U. S., 1).

Employers' Liability Cases (207 U. S., 463).

Adair v. *United States* (208 U. S., 161).

The *Johnson* case arose under the Safety Appliance Act (27 Stat., 531, c. 196), passed in 1893. The case was decided at the October term, 1904, eleven years after the act had been passed. The purpose of the act was precisely the same as the purpose of the hours-of-service law, namely, to promote the safety of persons concerned in interstate commerce. Although the case was exhaustively argued and carefully considered, neither counsel nor court questioned the propriety of the statute as a legitimate regulation of interstate commerce.

The *Employers' Liability Cases* involved the constitutionality of the Employers' Liability Act of 1906. That statute was held unconstitutional because it was construed to prescribe a rule of liability from master to servant as well when the servant was employed in intrastate commerce as when he was employed in interstate commerce; but the power of Congress to regulate the relation of master and servant in a proper case was, in terms, upheld. The court said (pp. 494, 495, 496):

> The proposition that there is an absolute want of power in Congress to enact the statute is based on the assumption that as the statute

is solely addressed to the regulation of the relations of the employer to those whom he employs and the relation of those employed by him among themselves, it deals with subjects which can not under any circumstances come within the power conferred upon Congress to regulate commerce.

As it is patent that the act does regulate the relation of master and servant in the cases to which it applies, it must follow that the act is beyond the authority of Congress if the proposition just stated be well founded. But we may not test the power of Congress to regulate commerce solely by abstractly considering the particular subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. On the contrary, the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce. We think the unsoundness of the contention that, because the act regulates the relation of master and servant, it is unconstitutional, because under no circumstances and to no extent can the regulation of such subject be within the grant of authority to regulate commerce, is demonstrable. We say this because we fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by

Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce or within the authority given to use all means appropriate to the exercise of the powers conferred.

To illustrate: Take the case of an interstate railway train, that is, a train moving in interstate commerce, and the regulation of which therefore is, in the nature of things, a regulation of such commerce. It can not be said that because a regulation adopted by Congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. This must be, since to admit the authority to regulate such train, and yet to say that all regulations which deal with the relation of master and servants engaged in its operation are invalid for want of power would be but to concede the power and then to deny it, or at all events to recognize the power and yet to render it incomplete.

Because of the reasons just stated we might well pass from the consideration of the subject. We add, however, that we think the error of the proposition is shown by previous decisions of this court. Thus the want of power in a State to interfere with an interstate commerce train, if thereby a direct burden is imposed upon interstate commerce, is settled beyond question. *Mississippi R. R. Co.* v. *Illinois Cent. R. R.*, 203 U. S., 335, 343,

and cases cited; *Atlantic Coast Line R. R.* v. *Wharton et al., Railroad Commissioners*, 207 U. S., 328. And decisions cited in the margin, holding that state statutes which regulated the relation of master and servant were applicable to those actually engaged in an operation of interstate commerce, because the state power existed until Congress acted, by necessary implication, refute the contention that a regulation of the subject, confined to interstate commerce, when adopted by Congress would be necessarily void because the regulation of the relation of master and servant was, however intimately connected with interstate commerce, beyond the power of Congress. And a like conclusion also persuasively results from previous rulings of this court concerning the act of Congress, known as the "Safety Appliance Act." (*Johnson* v. *Southern Pacific Co.*, 196 U. S., 1; *Schlemmer* v. *Buffalo, Rochester, etc. Ry.*, 205 U. S., 1.)

The *Adair* case presented the constitutionality of section 10 of the act of Congress known as the "Erdman Act," of June 1, 1898 (30 Stat., 424), which prohibited carriers from threatening any employee with loss of employment or from unjustly discriminating against any employee because of his membership in a labor organization. The act was held to be unconstitutional because it unreasonably interfered with both the right of personal liberty and the right of property guaranteed by the Fifth Amendment to the Constitution. But again this court distinctly recognized the right of Congress to prescribe reasonable

conditions affecting the relation of interstate carriers to their employees. (208 U. S., 161, 177, 178.)

> The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed. Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution. *Northern Securities Co.* v. *United States*, 193 U. S., 197, and authorities there cited. In this connection we may refer to *Johnson* v. *Railroad*, (196 U. S., 1), relied on in argument, which case arose under the act of Congress of March 2, 1893 (27 Stat., 531, c. 196). That act required carriers engaged in interstate commerce to equip their cars used in such commerce with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes. *But the act upon its face showed that its object was to promote the safety of employees and travelers upon railroads; and this court sustained its validity upon the ground that it manifestly had reference to interstate commerce and was calculated to subserve the interests of such commerce by affording protection to employees and travelers.* It was held that there was a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object. So, in regard to *Employers' Liability Cases*, 207 U. S., 463, decided at the present term. In that

> case the court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employees in such interstate commerce, in cases of personal injuries received by employees while actually engaged in such commerce. The decision on this point was placed on the ground that a rule of that character would have direct reference to the conduct of interstate commerce, and would, therefore, be within the competency of Congress to establish for commerce among the States.

2. The hours-of-service act indubitably was passed for the purpose of promoting the safety (1) of persons engaged in moving interstate trains and (2) of persons being carried on interstate trains. Both the title and history of the act show this. The title is, "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon." The direct relation between the overworking of employees connected with train movements and accidents to trains has been recognized for years, and was the subject of much agitation long prior to the passage of the hours-of-service act. As far back as 1904 the Interstate Commerce Commission, at page 105 of its Eighteenth Annual Report, said:

> The part played by excessive hours of labor in causing railroad accidents is a question that calls for serious consideration. The bulletins published by the commission record many accidents where the employees involved have been

> on duty an excessive number of hours, and many complaints from employees that have been required to work for excessive periods of time have been brought to the attention of the commission. There are a few roads that have stringent rules to guard against the overworking of train men, but in most cases the matter is left entirely to the discretion of the men and to subordinate officials immediately in charge. These subordinate officials in their eagerness to keep traffic moving frequently ov tax the men, and in many cases the men themselves, through greed for making big pay, wilingly remain on duty for excessive periods of time. If there is a reason for limiting the hours of labor in any employment it applies with peculiar force to the operation of railroad trains, since the safety of the traveling public is so largely dependent on the alertness and intelligence of train employees.

Again, on pages 78 and 79 of its Nineteenth Annual Report (1905), the commission made the following statement:

> Another important feature of railroad operation is the hours of labor of railroad employees, especially of engine men, conductors, and other train men, telegraph operators, and signalmen. All these men are constantly charged with delicate and responsible duties, and they should never be on duty except when in good physical and mental condition. The need of a high standard in this respect and of care on the part of the supervisory officers to

see that proper regulations are maintained and obeyed is quite generally recognized, and a considerable number of railroads have prescribed rules limiting the hours of work and providing suitable rest periods; but these rules often appear to be very poorly enforced. Evidence of overwork appears frequently in the accident reports. Besides those cases of men remaining on duty because of wrecks or snowstorms, or other emergencies, there is much irregularity in every-day train service. The disposition of men to work beyond reasonable limits of physical endurance, for the sake of facilitating the business of the railroad or to increase their earnings, may be seen in other departments than the train service. Signalmen, who usually work regular turns of twelve hours each, sometimes take each other's places in case of sickness or an unexpected call of a man away from his home, and thus remain on duty thirty-six hours at a time.

This defect in the service, due to overwork, is frequently discovered in conjunction with a deficiency of another sort—inexperience.

Men who have been but a few months in the service, and who have yet much to learn concerning some features of their duties, should be required to comply with the rest-time regulation with the most scrupulous care; yet it often happens, as has been shown in the accident records, that new men, admittedly less competent for their duties on that account, are the very ones who have been put to the additional test of working overhours.

Still again, in a communication to the President, dated July 26, 1906, the commission said:

> Attention has also been called by the commission in several of its "Accident bulletins" to railway accidents, the reports of which made to the commission under the railway-accident law of 1901 show an excessive number of hours devoted to continuous labor by employees of this description.
>
> Believing that the remedy for the overworking of railway employees connected with the operation of trains, whether resulting from a desire on the part of the men to obtain larger pay or the enforcement of rules governing their time of labor, could be determined with greater propriety by the Congress, the commission has refrained from submitting any specific recommendation for legislation concerning the hours of labor and rest for this class of employees engaged in the transportation of interstate commerce.
>
> On the other hand, the Committee on Interstate and Foreign Commerce of the House of Representatives has made a rather full report upon the subject, concluding with a bill prohibiting the remaining on duty of any such employee for a longer period than sixteen consecutive hours, and providing that when the employee has been on duty for that length of time he shall be relieved and not required or permitted to return to labor until after the expiration of at least ten consecutive hours. The bill further provides that if the labor has extended continuously over more than ten

hours a period of eight hours off duty must be enforced. A bill containing similar provisions is also pending in the Senate, where by agreement it is to be put upon its passage in January next.

The commission repeats the opinion heretofore indicated in its reports that some regulation of the hours of labor and rest of employees connected with train service upon our railways is demanded in the interest of safety to passengers and to these men who may be injured in collisions or derailments wholly or partially resulting from the exhibition of inattention or inefficiency accompanied by an excessive period of continuous work. While the commission does not assume to say just what that regulation should be, it is unable to propose any better rule than that set forth in the pending measures.

In a memorandum presented to the Committee on Interstate and Foreign Commerce of the House of Representatives, at a hearing of that committee on April 20, 1906, it is stated:

Reports made to the commission by railroad companies under the accident law of 1901 cover 225 collisions and derailments in which 51 persons were killed and 308 injured, where the employees involved had been on duty continuously for periods ranging between fifteen and forty-eight hours.

Thirty-seven of these casualties were directly caused by employees going to sleep on duty, and the presumption is that many of the others were directly or indirectly caused by excessive hours of labor.

> In the personal-injury reports made to the commission, casualties not due to collisions or derailments, 57 accidents are reported in which the employees concerned had been on duty fifteen hours or more. These accidents total 17 deaths and 51 injuries, and 24 of them were directly caused by employees going to sleep on duty. (Hearing before Committee on Interstate and Foreign Commerce, House of Representatives, on the bills H. R. 4438, H. R. 16676, and H. R. 18671; Government Printing Office, 1906.)

In the President's message to the third session of the Fifty-eighth Congress the need of the legislation here involved was pointed out in the following language:

> I * * * would also point out to the Congress the urgent need of legislation in the interest of the public safety, limiting the hours of labor for railroad employees in train service upon railroads engaged in interstate commerce.

And in a later message the President again urged the passage of the law, saying:

> The excessive hours of labor to which railroad employees in train service are in many cases subjected is also a matter which may well engage the serious attention of the Congress. The strain, both mental and physical, upon those who are engaged in the movement and operation of railroad trains under a modern condition is perhaps greater than that which exists in any other industry, and *if*

> *there are any reasons for limiting by law the hours of labor in any employment, they certainly apply with peculiar force to the employment of those upon whose vigilance and alertness in the performance of their duty the safety of all who travel by rail depends.*

With this history, to which the court is at liberty to refer (*Johnson* v. *Southern Pacific Co.*, *supra*), and with the express declaration of purpose in the title of the act, it can not be doubted that the object of Congress in passing the act was, as stated in the title, "to promote the safety of employees and travelers upon trains engaged in interstate commerce."

3. The objection which was held fatal to the Employers' Liability Act (namely, that the act applied in cases where no interstate commerce was involved) is not tenable in this case for two reasons:

A. Even if this hours-of-service act applies to employees on intrastate trains, it still is valid. The case is clearly distinguishable in that respect from the *Employers' Liability Cases*. As already pointed out, the fundamental and directive purpose of the hours-of-service law is to conserve the safety of employees and passengers on board trains moving in interstate commerce. The manner in which that safety is sought to be promoted is by prescribing for servants employed in or connected with the movement of trains maximum periods of work and minimum periods of rest. These provisions tend toward the safety of trains, because the employee who is worn out through overwork can not, in the nature of things, be capable of

the same alert attention to the thousand details necessary to the proper performance of his duties as he could give if he were in good physical condition; and his inattention even for a moment may lead to one of the disastrous accidents sought to be prevented. Now, these accidents may result from many different causes. A tower man may throw the wrong switch and derail an intrastate train, and a following interstate train may run into the wreck; a telegraph operator may make a mistake in transmitting or receiving a message and cause a collision of an intrastate train with an interstate train; a train dispatcher may make a mistake in determining the locations of two trains approaching each other, with like result; the engineer on an interstate train may run by a signal and collide with an *intrastate* train ahead of him; similarly, the engineer of an *intrastate* train may run by a signal and collide with an *interstate* train ahead; or the brakeman or conductor of an *intrastate* train may neglect to display proper signals at its rear end or to send back a flagman when it makes an unexpected stop and may thus permit an *interstate* train to run it down. These are some of the commonest ways in which accidents result. They are mentioned because they illustrate conclusively that the safety of the train moving in interstate commerce is quite as dependent upon the care and vigilance of the employees engaged in moving *intrastate* trains as upon the care and vigilance of the employees upon the interstate trains themselves. In other words, in order to safeguard

interstate trains against the disastrous consequences of the overworking of employees connected with train movements, it is absolutely necessary that *all employees so engaged* should have the benefit of the act and so be equally vigilant and efficient. If Congress has power to provide for the safety of interstate trains at all, it has the power to adopt *effective* means of promoting that safety; and the particular menace dealt with by the hours-of-service act can only be *effectually* avoided by limiting the hours of service of *all* employees connected with train movements—whether the particular train upon which any given employee may be working is engaged in interstate or intrastate commerce.

In the *Employers' Liability Cases* the question was altogether different. The act then under view prescribed a rule of liability as between master and servant. This court held it was within the power of Congress to do that so long as the scope of the act did not embrace servants engaged in intrastate commerce alone. In so far, therefore, as that case and this one are analogous, the *Employers' Liability Cases* sustain the principle of the hours-of-service law; for in the *Employers' Liability Cases* it was not doubted, indeed it was expressly asserted, that Congress could make the carrier liable to its servant engaged in interstate commerce, no matter whose negligence (as between interstate and intrastate employees) caused the injury. The rule announced was only that Congress could not legislate *for the benefit* of purely intrastate employees. That is the

sum and substance of the decision; and its principle is not infringed by the hours-of-service law, because *that legislation is for the benefit* of interstate employees and passengers.

B. Were it necessary to the constitutionality of the hours of service law, it would be entirely permissible, and so proper, to construe that act as regulating the hours of work and rest of only those employees engaged about the movement of interstate trains. Such construction is not claimed by the Government; but its possibility will be shown, as a means of saving the statute (if that course is necessary) under the rule which requires a statute to be construed in a way to make it constitutional, if the language of the enactment does not certainly forbid.

Section 1 of the act says: "That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, *and employees, engaged in the transportation of passengers or property by railroad" in the District of Columbia or a Territory or in interstate or foreign commerce.* The clause concerning engagement in commerce under the control of Congress therefore follows, and may be taken to qualify the word "employees," just as it follows and qualifies "any common carrier or carriers, their officers, agents." In this feature the hours-of-service law is importantly different from the Employers' Liability Act, the latter reading: "That every common carrier engaged in trade or commerce" in the District of Columbia or a Territory, or in interstate or foreign commerce, "shall be liable to any of its employees,"

etc. The word "employees" in that act is not followed by any clause restricting it to an employee engaged in commerce under the control of Congress. Further, the comprehensive application of the statutory rule to all employees was emphasized by the language "liable *to any* of its employees," and that language was used uniformly throughout the statute. Nowhere in the act was there any phraseology permitting its restriction to interstate employees. (34 Stat., 232, c. 3073.)

In addition, section 2 of the hours-of-service act says: "That it shall be unlawful for any common carrier, its officers, or agents subject to this act to require or permit any employee *subject to this act* to be or remain on duty for a longer period," etc.; and the later parts of the section refer expressly to "any *such* employee." This may refer to the definition of employees given at the end of section 1, in the language that "the term 'employees' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train;" but, if necessary to the constitutional validity of the statute, this definition of employees may and will be itself qualified by the first sentence of the first section quoted already, which declares that the act shall apply to "any common carrier or carriers, their officers, agents, and employees engaged in the transportation of passengers or property" in the District of Columbia or a Territory or in interstate or foreign commerce.

Restriction of the statute to employees engaged in commerce under the control of Congress is therefore entirely possible under the language of the statute, if its constitutional validity requires that construction.

4. Nor does the law unwarrantably interfere with the right of contract guaranteed by the Constitution. It is directly within the principle of *Holden* v. *Hardy* (169 U. S., 366), where a law of the State of Utah limiting the hours of service of miners and employees in smelters and ore-reduction works was upheld, though attacked on the ground above referred to. It of course makes no difference that there the law was a state statute while here it is a Federal enactment, because the Fourteenth Amendment, which contains the "equal protection" clause beside the "due process" clause, is certainly no less broad than the Fifth Amendment, restricting the powers of Congress in respect to denial of due process of law, and also because the power of Congress over subjects within its jurisdiction at all is as ample as that of a State. Given a proper subject of regulation by Congress, the Federal legislative power in respect of that regulation is plenary, just as are the powers of the States in respect of subjects which they have the right to regulate. This is settled by the *Employers' Liability Cases*, already cited. (See pp. 492–493.) The following quotation from *Holden* v. *Hardy* is therefore directly in point (p. 395):

> Upon the principles above stated, we think the act in question may be sustained as a valid

> exercise of the police power of the State. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject can not be reviewed by the federal courts.
>
> * * * * *
>
> We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employees, and there are reasonable grounds for believing that such determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class.

If the liberty of contract may be interfered with for the benefit of one of the contracting parties (the employee himself), *a fortiori* may it be interfered with for the protection of others likely to be injured by the carrying out of the contract. The parties

may, if they choose, protect themselves by their contracts; but all others are helpless. The passenger can not ascertain before he takes a train whether the employees upon it are in fit physical condition; nor, if he could, would that fact avail him anything, for the employees on a train ahead or a train behind may be unfit for service. And the employees on each train are in precisely the same predicament. The need of legislation for their protection is therefore vastly more urgent than the need of the contracting parties themselves, and in either case the *object of the law is the conservation of the public health or safety, whether the contracting parties themselves or others are the ones endangered.* It is true of the hours-of-service law, however, that it operates to protect the safety of *both* employees and passengers on interstate trains.

The correctness of the decision in *Holden* v. *Hardy* has never been questioned. Indeed, this court has several times recognized its authority (*Atkin* v. *Kansas*, 191 U. S., 207; *Lochner* v. *New York*, 198 U. S., 45, 54); and no subsequent decision of this court has in the least weakened its force as an authority. Corroboration is given to it by *Muller* v. *Oregon* (208 U. S., 412).

It is true that in the case of *Lochner* v. *New York*, *supra*, it was held that a statute limiting the hours of service of employees in bakeries was unconstitutional, but this was on the ground that it can not be reasonably claimed that work in a bakery is unhealthy, or that "*any other portion of the public than*

those who are engaged in that occupation" can be affected by the overworking of bakers (p. 57). The case was therefore found to be a plain one of arbitrary and unnecessary interference with the personal liberty of the bakers and their employees; but the court not only approved the doctrine of *Holden* v. *Hardy*, but adhered to the rule laid down in that case for testing the constitutionality of such legislation, saying (p. 56):

> In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate?

If, then, the hours-of-service law can stand this test, it is constitutional, and it does meet it. First, as to fairness and reasonableness: The statute involved in *Holden* v. *Hardy* limited the length of service to eight hours per day. This was held to be a fair and reasonable limitation. Here the limitation is to sixteen hours per day. Under the eight-hour law the employee is entitled to sixteen hours off duty each day. Here the limitation is to ten hours only. The purpose of the statute upheld in *Holden* v. *Hardy* was to prevent the employees concerned from injuring themselves. Here the purpose

is to prevent them from injuring not merely themselves but others as well, persons who can not except through this law be protected, persons whose very lives are dependent on the vigilance of the employees whose hours of service are limited. It can not be contended that the law involved here is less fair or less reasonable either to the employer or to the employee than the law considered in *Holden* v. *Hardy*.

We come then to the test of appropriateness. About this there is even less doubt. The court may judicially know, because it is matter of common knowledge, that the safety of every train every moment after it is made up is dependent absolutely on the vigilance of innumerable employees. The engineer must be on the lookout for signals, for obstructions on the track, for loose or broken rails, for open switches. He must make the speed conform to the condition of the track. He must observe the orders of the train dispatcher. The conductor and brakeman must be watchful of the condition of the train in general—of the coupling apparatus, of the brakes, and of the signals displayed upon it, in particular; must watch the track behind the train, send out a flagman and display proper signals when it makes an unexpected stop, know that the engineer is faithfully observing his orders, and be always ready to take the proper steps in any emergency. The switch tender and signalman, the train dispatcher and telegraph operator must all be constantly alert and watchful, must perform their duties with care and efficiency. A mistake by any one of them is al-

most certain to result in disaster. Is a measure which makes for competency on the part of these men, by preventing them from being overworked, *inappropriate* as a means for the protection of all who may be endangered by their acts?

The statute under consideration can not be deemed unreasonable or arbitrary; and consequently it does not unduly infringe upon the personal liberty and freedom of contract guaranteed by the Constitution.

II.

The hours-of-service law being valid, the Interstate Commerce Commission had statutory authority to make its order requiring monthly reports from common carriers of their practice in reference to the working and resting time of their employees engaged in or connected with the movement of trains.

It must first be observed that the order is no wider than the hours-of-service law itself, whether that act be construed as applying to all employees engaged about the movement of trains or only to employees engaged about the movement of interstate trains. This will appear both from the language of the order (Rec., 3–5) and from the commission's circular letter of August 15, 1908, with its accompanying instructions (Rec., 14–15). All these documents require report in the case of "each employee who was either on duty for a period of time in excess of that contemplated by the act or who had not been off duty after any period of service for the length of

time prescribed by the act" (Rec., 5). Subdivision 4 of the instructions likewise speaks of "reports and records of the hours of service of employees subject to the act entitled," etc. (Rec., 15). Indeed, the bill admits that the required report is not to go beyond the scope of the statute, as it alleges "that the purpose of said Interstate Commerce Commission in making said above-recited order and in requiring the reports to be made pursuant to the terms thereof was to enable it to secure from carriers evidence of infractions of the law, in order that suits might thereupon be brought to recover the penalties consequent thereon, as prescribed by the aforesaid act" (Rec., 5).

Further, even if the statute should be construed as relating only to employees engaged about the movement of interstate trains, it would be proper for the commission to require report concerning the hours of work and rest of all employees engaged about train movements; because only by such complete reports could the commission put itself in position to investigate adequately whether in any case the statute had been violated. The truth is that it may be doubted whether there is any train which does no interstate business. Certainly there are very few. A single interstate passenger or a single pound of interstate freight will give to a train an interstate character. The reporting carrier, however, might well, through design or mistake, consider a particular employee who had been required or allowed to work longer than the statute contemplates not to have

been engaged about the movement of an interstate train when in fact he was; and therefore the commission ought to have reported to it all cases of excess work by any employee connected with the movement of a train, so that the commission can itself inquire concerning the actual applicability of the statute to the particular instance.

Whatever may be the true construction of this hours-of-service law, therefore, the commission's order does not go beyond what is proper and necessary in aid of the commission's duty, under section 4, "to execute and enforce the provisions of this act."

Let us turn, then, to the power of the commission to require any report at all concerning the practice of a carrier in requiring work without allowing opportunity for rest to its employees. This inquiry must be answered with proper regard to the further provision of section 4 of the statute that "all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act."

We are thus referred directly to section 12 of the Interstate Commerce Act, as amended February 10, 1891 (26 Stat., 743, c. 128), and to section 20 of the same act, as amended June 29, 1906 (34 Stat., 593, c. 3591). The later amendment of section 20, on February 25, 1909 (35 Stat., 648, c. 193), has no pertinence.

1. As to section 12. The important portion is:

> That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep

> itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created.

These provisions have been in the act since its original enactment in 1887. The commission's powers under them are now available toward execution and enforcement of the hours-of-service law. Do those powers include the authority to require the report about which appellant complains?

(*a*) The information for which the report calls is certainly of a kind to which section 12 entitles it. Even if the right of the commission to inquire and to inform itself is limited to such aspects or features of railroad business as form the subject of the interstate commerce legislation, the practice of a carrier in respect of the working time and resting time of its employees is now within the oversight of the commission. Scrutiny into such practice and enforcement of the law with reference to it now make one of the "objects for which it [the commission] was created," and in reference to which the commission is entitled to obtain "full and complete information."

As well might it be said that the commission could not inquire into or keep itself informed about or obtain information from a carrier concerning the reasonableness of rates, discriminations, pools, etc., as that it can not inquire into and keep itself informed

about and obtain information concerning the working and resting hours of employees engaged in the movement of trains.

(*b*) One or the other, or both, of the quoted clauses—concerning inquiry into the management of the carrier's business and obtaining "from such carriers" complete information necessary for the performance of the commission's duties—includes the right to require report from the carrier. The statute does not limit the commission to any particular mode of inquiry or to any single and exclusive method of getting information. It is perfectly general as to methods. Beyond this the statute says expressly that the commission may get its necessary, full and complete, information "from such common carriers;" and that means directly from them. Why, then, can not the commission call for a report from the carrier? It is the carrier alone that can give information, either fully or accurately, as to its own business. No other way of getting information from the carrier than by report, in answer to the commission's inquiries, can be as convenient or effectual.

(*c*) The power of the commission under the quoted provisions is not confined to requiring the attendance and examination of witnesses. The general language of the statute can not be so reduced. Further, the right to compel the attendance and examination of witnesses is expressly given later in the same section; and the general grants at the opening of the section are superfluous and meaningless if they amount only to what is later particularly provided.

2. As to section 20. The pertinent parts of this section are:

> That the commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, and from the owners of all railroads engaged in interstate commerce as defined in this act, to prescribe the manner in which such reports shall be made, *and to require from such carriers specific answers to all questions upon which the commission may need information.* Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of the business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights or agreements,

arrangements or contracts affecting the same as the commission may require; and the commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority to require said carriers to file monthly reports of earnings and expenses *or special reports within a specified period*, and if any such carrier shall fail to file such reports

> within the time fixed by the commission it shall be subject to the forfeitures last above provided.

These provisions authorize the report of which appellant complains.

(*a*) The power "to require from such carriers specific answers to all questions upon which the commission may need information" certainly embraces information concerning all subjects expressly within the control or supervision of the commission; and the execution and enforcement of the hours-of-service law are now among those subjects.

(*b*) The "authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period" is not limited to the subject of earnings and expenses. The additional mention of "special reports" means little if the special reports differ from the reports of earnings and expenses only in not being monthly or annual. It is more reasonable and more promotive of the proper effectiveness of this legislation to say that the commission is authorized to call for reports pertinent to any of the subjects committed to its care. It was natural, and Congress must have intended, to vest in the commission the visitorial power over carriers within the field wherein the statutes require the commission to see that the law is obeyed.

Further, the special reports which the commission is authorized to require can not well be deemed of narrower range than the power, previously enumer-

ated in the section, "to require from such carriers specific answers to *all questions upon which the commission may need information.*"

(*c*) The express power "to require from such carriers specific answers to all questions upon which the commission may need information" can not be held to be a mere incident of the annual reports of carriers. Such a view is forbidden by the allowance of "special reports;" and, in addition, it is forbidden by the first sentence of the second paragraph of the section, wherein (after requiring the annual report to be made by September 30 "unless additional time be granted in any case by the commission," and penalizing the carrier if it shall fail to file its annual report by September 30 "or within the time extended by the commission for making and filing the same") it is provided that like penalty shall attach if the carrier "shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do." This last clause obviously contemplates a failure to file some other than an annual report.

3. If section 20 can be held to relate only to an annual report or to a report of merely financial data, the argument then becomes still stronger that the provisions of section 12 authorize the requirement of report at any time upon any subject within the jurisdiction of the commission. Otherwise, the commission has no prompt or effective power of getting the varied information necessary to the discharge of its duties.

Even the power of compelling the attendance of witnesses and examining them will not avail the commission in getting information as to whether the hours-of-service law is obeyed; because this court held in *Harriman* v. *Interstate Commerce Commission* (211 U. S., 407), that witnesses can not be subpœnaed and examined by the commission except in investigations upon complaints for violations of the Interstate Commerce Act and in "investigations by the commission upon matters that might have been made the object of complaint" (p. 419). Notwithstanding the duty of the commission to execute and enforce the hours of service law, no complaint for violation of that law could be lodged with the commission. Only a court can entertain such complaint and impose the penalty for violation of the statute.

4. Unless the power of requiring report from the carrier, under section 12 or section 20 of the Interstate Commerce Act, was given to the commission in aid of its execution and enforcement of the hours-of-service law, what power of any kind was given to the commission by virtue of the express declaration in the hours-of-service law that "all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act?" (sec. 4). No power to entertain complaints or to punish for a violation of the hours-of-service act can have come to the commission. In view of the Harriman case, no power to summon or examine witnesses belongs to the commission, for the purpose of enforcing the hours-of-service act. The "extension" of the commission's

powers to the execution of the hours-of-service act must mean something; and it is difficult to see what it means if it does not give authority to require report.

Indeed, if section 20 of the Interstate Commerce Act did not previously allow the commission to require any but a financial report, it may well be said that section 4 of the hours-of-service act added a new topic or item to the proper subjects of report under section 20; as if there were written into the latter section, concerning the subjects of annual and monthly and special reports, some such language as "the periods of work and rest of employees governed by the act of March 4, 1907." This is justified by the fact that section 20 can not be "extended" to the commission in its execution and enforcement of the hours-of-service law without inclusion of such a topic among the proper heads of report. Even if that subject then was not within the scope of section 20, apart from the hours-of-service law, section 20 was extended to that subject by the latter statute.

5. Nothing in the case of *Harriman* v. *Interstate Commerce Commission*, *supra*, militates against any of the previous contentions. The decision in that case was limited, both by the facts of the case and by this court's careful declaration, to the compulsory attendance and examination of witnesses. It was expressly said:

> All that we are considering is the power under the act to regulate commerce and its amendments to extort evidence from a witness

> by compulsion. What reports or investigations the Commission may make without that aid, but with the help of such returns or special reports as it may require from the carrier, we need not decide (p. 422).

The rule announced as to compelling the attendance and examination of witnesses was rested in part upon the fact that witnesses can be called from any place in the United States to any designated place of hearing (p. 418); and, doubtless still more fundamentally, it arose from the fact that natural persons are not, like corporations, subject to a general visitorial power in the State. It is an exercise of that visitorial power to require reports from corporate carriers concerning the conduct of their business.

6. Much that is of high importance upon the point in hand was said by this court in *Interstate Commerce Commission* v. *Brimson* (154 U. S., 447).

Concerning the practical necessity of a vigilant administrative body, clothed with effective power to investigate the conduct of interstate commerce, this court declared:

> An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far toward defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize

> the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce can not be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules (p. 474).

Like language will be found on page 472; and in support of the right of Congress to authorize investigation by any appropriate means it was said:

> The general principle applicable to this subject was long ago announced by this court, and has been so often affirmed and applied that argument in support of it is unnecessary, even if it were possible to suggest any thought not heretofore expressed in the adjudged cases. In the great case of *McCulloch* v. *Maryland* (4 Wheat., 316, 421, 423) it was said: "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to

that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." Again: "Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

III.

The order of the commission does not transgress either the Fourth or the Fifth Amendment to the Constitution of the United States, because the required report is not an unreasonable search or seizure and it does not unlawfully compel a carrier or its employees to self-incrimination.

The objections made by appellant to the commission's order under this general head are:

1. That the requirement of report subjects the corporation to an unreasonable search or seizure of its papers or effects.

2. That the required report will compel the corporation to incriminate itself.

3. That the order of the commission will require the carrier's employees to incriminate themselves.

As to these claims, severally:

1. The required report does not violate "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" (Fourth Amendment).

(1) Search and seizure are both *physical* intrusions, upon the person or his house, papers, or effects. It was said in *Hale* v. *Henkel* (201 U. S., 43), on page 76, that "a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner." An exception to this rule is sometimes supposed to have been recognized in *Boyd* v. *United States* (116 U. S., 616), but the exception is not real. In that case a compulsory production of books or papers, with the result of incriminating the person producing them, was held to be an unreasonable search and seizure; but this production of books and papers for which the unconstitutional enactment called was itself a physical act and involved a physical invasion. The books and papers were required to be surrendered by their owner and he was temporarily dispossessed of them. The dispossession was no less real because it was enforced upon the owner of the books and papers by process which could not be disobeyed without penal consequence than it would have been if the party seeking the books and papers had directly seized them.

On the other hand, a report such as is required from appellant is merely an enforced statement of the reporting party's knowledge, and it involves no physical invasion of the reporting party's person, house, papers, or effects. The person suffers no interference. No house is entered. All papers and effects are left in the uninterrupted possession of their owner; and no penalty is attached, as in the Boyd case, for a fail-

ure to produce them. Their production is not even commanded.

(2) Even searches and seizures are not prohibited unless they are unreasonable. The report required from appellant is not unreasonable, because—

(*a*) It is a proper exercise of the State's visitorial power over corporations, and a corporation can be compelled even to incriminate itself through furnishing at the State's command information about the conduct of its business. This is already settled by:

Hale v. *Henkel, supra.*

Hammond Packing Co. v. *Arkansas* (212 U. S., 322, 348, 349).

Consolidated Rendering Co. v. *Vermont* (207 U. S., 541, 553).

American Tobacco Co. v. *Werckmeister* (207 U. S., 284, 302).

It was said in *Hale* v. *Henkel:*

> If whenever an officer or employee of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between

> an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. * * * There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges (pp. 74–75).

(*b*) Even a natural person may be compelled to produce his books and papers for use as evidence unless they tend to incriminate him. In the *Boyd* case, *supra*, the reason for holding the search to be unreasonable was that defendant's books and papers were to be used for his incrimination. If, therefore, there be any natural person or group of natural persons operating an interstate railroad, they can not object

to the commission's order except in a case where it will require them to incriminate themselves.

2. The commission's order can not be attacked by appellant on the ground that it will compel self-incrimination.

(*a*) As already stated, a corporation can be required to inform the State of the manner in which it conducts its business, though that information may incriminate.

Hale v. *Henkel, supra.*

Hammond Packing Co. v. *Arkansas, supra.*

(*b*) Appellant can not set up a privilege against self-incrimination belonging to an unincorporated interstate carrier, if there be any. That privilege is personal and may be waived.

Hale v. *Henkel, supra* (p. 69).

McAlister v. *Henkel* (201 U. S., 90).

(*c*) Even when a statute may be considered to be unconstitutional as against a natural carrier by railroad, through subjecting him to an improper rule of criminal responsibility, and the right of the natural carrier which is invaded by the statute is not a mere personal privilege such as may be waived, still the statute must be upheld against corporate carriers, because in view of there being few, if any, unincorporated carriers by railroad, Congress would undoubtedly have enacted the statute as to corporations alone.

New York Cent. & Hudson River R. R. Co. v. *United States* (212 U. S., 481, 496, 497).

In that case it was said:

> It is contended that the Elkins law is unconstitutional, in that it applies to individual carriers as well as those of a corporate character, and attributes the act of the agent to all common carriers, thereby making the crime of one person that of another, thus depriving the latter of due process of law and the presumption of innocence which the law raises in his favor. * * * We think the answer to this proposition is obvious; the plaintiff in error is a corporation, and the provision as to its responsibility for acts of its agents is specifically stated in the first paragraph of the section. There is no individual in this case complaining of the unconstitutionality of the act, if objectionable on that ground, and the case does not come within that class of cases in which unconstitutional provisions are so interblended with valid ones that the whole act must fall, notwithstanding its constitutionality is challenged by one who might be legally brought within its provisions. (*Employers' Liability Cases*, 207 U. S., 463.) It may be doubted whether there are any individual carriers engaged in interstate commerce, and every act is to be construed so as to maintain its constitutionality if possible. There can be no question that Congress would have applied these provisions to corporation carriers, whether individuals were included or not. In this view the act is valid as to corporations (pp. 496–497).

(*d*) It is by no means true that in every instance and as to all employees the carrier's report must incriminate it. In most cases it will not. One of the most beneficent results of the commission's order will be that the prompt publicity which it requires concerning the carrier's conduct will operate as a powerful deterrent from infractions of the law. Even when an employee works longer than the statute ordinarily allows, there may be no incrimination. It is expressly provided in the act:

> "That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen." (End of sec. 3.)

3. The requirement of report by the carrier will not improperly compel its employees to incriminate themselves; and appellant, any way, can not found this suit upon the personal privilege of its employees.

(1) The exact point made by appellant as to supposed self-incrimination of its employees is that the requirement of report from the carrier presupposes and necessitates a system of internal reports to the carrier itself by those very employees who may be personally guilty of violating the hours-of-service law; and that consequently the order of the commission itself makes it necessary that the guilty

employees of the carrier incriminate themselves. Thus division 7 of the bill reads:

> Your orator further avers that the said order necessarily contemplates and requires that infractions of the law which may occur—and it is inevitable that through oversight, inadvertence, or mistake such infractions will occur—shall be made the subject of report to your orator by the officers concerned in or responsible for such infractions, which said reports will become part of the records of your orator, and as such will be open to the inspection of the said Interstate Commerce Commission. The inevitable and necessary result, therefore, of the enforcement of the said order will be that officers of your orator will be required to report in writing infractions or violations of the law, which said reports will be open to the inspection of the said commission, whose duty it will be to cause the said reports to be delivered to the United States district attorney empowered to act in the matter, in order that the same may be used by him in securing the conviction of the officer making them, of a violation of the said act, and the consequent infliction upon such officer of the penalties prescribed thereby. The enforcement, therefore, of the said order will have the necessary effect of requiring the officers of your orator to make reports which will be evidence sufficient to convict them of violations of the act, and consequently to subject them to the penalties prescribed therein, a result which is opposed to and violative of the rights

guaranteed by the fourth and fifth amendments to the Constitution of the United States. (Rec., 6.)

This, too, is the only position which appellant can take as to its employees, because the disclosure by the carrier of offenses of its officers or agents, coming to the carrier's knowledge from other sources than such guilty officers or agents themselves, would not violate any privilege of the guilty officers or agents.

Several answers to this claim present themselves:

(*a*) It is not necessarily true that the internal reports from the carrier's employees to itself must proceed from the very persons guilty of violating the law. On the contrary, the timekeepers may well make these internal reports of the names of employees working too long or resting too little and of their periods of work and rest, while the infraction of the law would of course have been ordered by quite another person than the reporting employee, such as the general manager, general superintendent, division superintendent, or train master. The data for such timekeeper's reports would, or could, be derived from the very employees whose period of work or rest was in question. The order of the commission therefore does not necessitate self-incrimination by the carrier's officers or agents.

Indeed, the carrier could get its own necessary information, if it were otherwise impracticable, through a body of special inspectors.

(*b*) The report to the carrier itself from its officers or employees, even though they be the very officers or employees violating the law, *is not made under compulsion of law*, but is made in obedience to the mere ordinary authority of an employer over his employees. Before there can be compulsory self-incrimination the disclosure must be coerced by legal process or public authority. The fact that the carrier's own report is enforced by law does not put the report to the carrier from its employees under compulsion of law. The United States could not mandamus the carrier's employee to report to the carrier, nor could the United States subject a nonreporting employee to a fine or any other punishment for disobeying his employer through not reporting. The commission's order is directed to the carrier only, and its statutory sanction falls only upon the carrier.

(*c*) Finally, and particularly, the employee whose report to the carrier is claimed to compel the employee to incriminate himself has agreed with his employer when accepting employment to render to his employer proper report of all his doings in the employment. That is implied as one term of every agency or employment contract. Such an agreed report to the principal or master, though it disclose criminality on the part of the agent or employee, is not a compulsory and unwarrantable self-incrimination, but is merely the discharge of the employee's obligations to his employer.

It may correctly be said that the employee has waived in advance in favor of his employer any

right to withhold from him knowledge of the employee's acts in the employment, however illegal or criminal. Any other view would justify the agent in refusing truthful and full disclosure to his principal of the conduct of his agency.

When reports are made by the employee to his employer, they are the latter's own property. He may use them as he will, and the State may compel their production for use in evidence against the employee, just as it always can use papers or knowledge of anybody else than the criminal in aid of a prosecution.

As well could it be decided that a public officer can not be compelled to keep correct books, showing his official action or transactions, because they may show that he has embezzled public money; or as well might it be asserted that the books of such public officer can not be used against him in support of a crmininal charge, as claim that reports from the carrier's employee to the carrier of the conduct of the employment can not be required by the carrier and can not be used in support of a criminal prosecution against the employee. As well, too, could it be said that a carrier can not be required to keep true books and accounts concerning its freight transactions, because they must be based on information from the carrier's officers and agents conducting the transactions and so may tend to show those officers and agents guilty of criminal doings, such as giving rebates.

(2) In any event, appellant can not support this suit on the personal privilege of its employees. *Non constat* but they all or some of them would waive that privilege.

> Wigmore on Evidence (sec. 2259, p. 3115, et seq.).

(3) It is peculiarly grotesque for appellant to claim that it can maintain a bill in chancery to enjoin enforcement of the commission's order because some one else than appellant may be injured by it. Equitable relief is not dispensed to volunteer vindicators of another's right.

IV.

The claim that the order of the commission violates the Fourth or the Fifth Amendment to the Constitution of the United States can not be entertained in this case, because no harm can come to appellant through its disclosure of the data the commission seeks by the directed report, unless appellant violates the hours-of-service statute, and a court of chancery certainly will not accord its aid to save a lawbreaker from discovery of his crime.

Unless appellant violates the law, these reports can not incriminate it. The claim of unreasonable search and seizure, even if all the answers peculiar to a corporation are neglected, is unfounded, unless the reports will incriminate appellant. The prayer for equitable relief must therefore be founded, as the bill actually does found it (division 7 of the bill; Rec., 6), upon violations of the statute. Planting its claim upon wrongdoing, appellant does not come into court with clean hands.

V.

All questions raised by the bill could be made as effectually in defense of a suit to enforce obedience to the commission's order or in defense of a prosecution for violating the order; the bill is not supportable as a means of avoiding a multiplicity of suits; and there is no proper foundation for jurisdiction in chancery.

Invalidity of the order here in question will not of itself confer upon a court of chancery jurisdiction to hear and decide this case. Some other recognized ground of equitable jurisdiction must appear.

> *Boise Artesian Water Co.* v. *Boise City* (213 U. S., 276).

In that case a city ordinance imposing upon the water company a license fees for use of streets was attacked on the ground that it was repugnant to the Federal Constitution. The court said:

> It is obvious that the rights of which the company seeks to avail itself are rights cognizable in a court of law, and not rights created only by the principles of equity. The sum of the company's contentions is that the imposition of the license fee was illegal, unconstitutional, and void. All these contentions are open in a court of law. It is a guiding rule in equity that in such a case it will not interpose where there is a plain, adequate, and complete remedy at law. This rule at an early date was crystallized into statute form by the sixteenth section of the Judiciary Act (Revised Statutes, section 723), which, if it has no other effect, emphasizes the rule and presses it upon the

> attention of courts. *New York, &c., Co.* v. *Memphis Water Co.*, 107 U. S., 205, 214. It is so well settled and has so often been acted upon that no authority need be cited in its support, though it must not be forgotten that the legal remedy must be as complete, practicable, and efficient as that which equity could afford. *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 1, 11 (page 281).
>
> * * * * *
>
> In order to give equity jurisdiction there must be shown, in addition to the illegality or unconstitutionality of the tax or imposition, other circumstances bringing the case under some recognized head of equity jurisdiction before the remedy by injunction can be awarded (page 282).

The only grounds of equitable jurisdiction alleged are: (1) That, as it will cost money to prepare these reports, appellant will be deprived of property without due process of law if it complies with the order; and (2) that, if appellant refuses obedience to the order, it may be subjected to a multiplicity of suits.

It is difficult to see how appellant will be deprived of property without due process of law through its expense in complying with the order when its obedience will be voluntary if the order is invalid. Appellant, like everybody else, is presumed to know the law. If the order in question is void, it need not obey the order; and no penalty will attach to its disobedience. In that case, therefore, any expense of complying with the order must be due to appellant's voluntary choice.

Nor will a multiplicity of suits against appellant result from its disobedience of the order in a way to support jurisdiction in chancery. However many suits or prosecutions might be instituted against appellant for violation of the commission's order, they would all be instituted by the United States. They could not be instituted by any private person, or even by the commission. Even if a mandamus proceeding were brought on the relation of the commission it would be instituted by the United States. In no possible contingency, therefore, would appellant be liable to a multiplicity of suits by different parties; and, with rare and extraordinary exceptions, chancery will not intervene to prevent several suits by the same party. In *Boise Artesian Water Co.* v. *Boise City*, *supra*, one suit at law had actually been begun, and the bill alleged, as this bill does, that complainant feared a multiplicity of suits; but this court said:

> Nor do we think there is any danger of a multiplicity of suits in the sense that would authorize the issuance of an injunction. One suit only has been brought, and that by direction of the city council. It remains pending, and when it reaches judgment it will determine finally every question in dispute between the parties. There is no need of any other suit, except to prevent the running of the statute of limitations, and nothing to indicate that any will be brought. Where the multiplicity of suits to be feared consists in repetitions of suits by the same person against

> the plaintiff for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single action with an honest purpose to settle the rights of the parties. (1 Pomeroy's Eq. Juris., 3d ed., sec. 254.) Perhaps it might be necessary to await the final decision of one action at law (see for analogies *Sharon* v. *Tucker*, 144 U. S., 533; *Boston, &c., Mining Co.* v. *Montana Ore Co.*, 188 U. S., 632), but that we need not decide (page 285, 286).

Especially, chancery will not act upon an unsupported fear of vexatious and oppressive suits by the Government.

CONCLUSION.

The decree of the Circuit Court, dismissing appellant's bill, should be affirmed.

LLOYD W. BOWERS,
Solicitor General.

DECEMBER, 1909.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE BALTIMORE AND OHIO RAILROAD Company, appellant, *v.* INTERSTATE COMMERCE COMMISION. } No. 222.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

SUPPLEMENTAL BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

STATEMENT.

The bill of complaint in this case was filed to secure the annulment of an order of the Interstate Commerce Commission formulated on the 3d of March, 1908, and promulgated thereafter, requiring the railroad companies to report to the Commission the hours of service of employees who were on duty in excess of the time prescribed by the act of Congress approved March 4, 1907 (34 Stat., 1415, c. 2939), entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," or who had not the statutory period of rest, together with the causes of

excess service or lack of rest, and the circumstances connected therewith and explanatory thereof. These reports were required to be made monthly by the official of the railroad company to whom hours of service of employees actually engaged in or connected with the movement of trains were reported by the subordinate officers and agents of the company.

The bill recited in general terms the act in question and the formulation and promulgation of the order of the Commission, and then complained (R., 1–7):

1. That the order was made and promulgated by the Interstate Commerce Commission without an opportunity having been afforded to the complainant and other carriers affected by it to be heard in respect to the lawfulness and propriety of the same, and that although the Commission was thereafter requested to accord a hearing, at which the objections to the order could be presented and considered, the request was denied.

2. That the purpose of the Commission in making the order and in requiring the reports to be made pursuant to the terms thereof was to enable it to secure from the carriers evidence of infractions of the law, in order that suits might thereupon be brought to recover the penalties consequent thereon, and that even if this was not the purpose of the order, such would be its result, because of the provision of the act which made it the duty of the Commission to lodge with the proper district attorneys information of any violation which might come to its knowledge, and the further provision of the act which made it

the duty of the district attorneys to bring suits, upon satisfactory information being lodged with them, to recover the penalties.

3. That if the order should be permitted to stand and complainant be required to make the reports called for therein it would, in the event of any infraction of the act by its officers or agents, be obliged to furnish, under oath, information of such infraction, and, consequently, would be required to disclose acts of its officers or agents which would not only subject them to the penalties prescribed by the act but would also subject the company to like penalties because of the provision of the act that in all prosecutions thereunder the carrier should be deemed to have had full knowledge of all acts of its officers and agents; and the enforcement of the order therefore would result in complainant being compelled to furnish evidence which could be used to establish infractions of the act, and, consequently, would subject it to the penalties prescribed, and would therefore be invalid as ignoring the rights guaranteed to the complainant by the Fourth and Fifth Amendments to the Constitution of the United States.

4. That the order necessarily contemplates and requires that infractions of the law which may occur (and it is inevitable that through oversight, inadvertence, or mistake such infractions will occur) shall be made the subject of report to the complainant by its officers concerned in or responsible for such infraction, which reports would become part of the company's records, and, as such, be open to the inspection of the

Interstate Commerce Commission, the inevitable result of the enforcement of the order being that officers of the complainant will be required to report, in writing, infractions of the law, which reports will be used in the prosecution of the officer making the reports, for a violation of the act and the consequent infliction upon such officer of the penalty prescribed by the act; and as the effect of all this is to require the officers of the complainant to make reports, which will be evidence sufficient to convict them of violations of the act, there is an invasion of the rights guaranteed to them by the Fourth and Fifth Amendments to the Constitution of the United States.

5. That neither the act of March 4, 1907, nor any other act of Congress has vested the Interstate Commerce Commission with authority to require such reports.

6. That compliance with the order would result in imposing upon the complainant the labor and expense of gathering the information called for and reporting it to the Commission, and so would deprive the complainant, in the event the order of the Commission was ultimately held to be invalid, of its property without due process of law.

7. That pending the ultimate determination as to the legality of the order, the complainant would be subject to be harrassed by a multiplicity of suits which would be brought against it by the Interstate Commerce Commission and the various district attorneys of the United States.

The bill prayed for a suspension of the order pending the final determination of the case, and, upon final hearing, a decree setting aside and annulling the order of the Interstate Commerce Commission and perpetually enjoining any action or proceedings thereunder.

DEMURRER.

The Commission demurred to the bill of complaint (R., 9–10):

1. That the complainant was not entitled to the relief prayed for upon the showing made by the bill.

2. That the bill prayed for relief from the consequences of future violations of the law.

3. That it prayed for relief of employees or officials of the complainant who were not named and not parties to the bill.

4. That complainant was not entitled to the protection of Article V of the amendments to the Constitution of the United States.

5. That the order against which relief is sought is not an unreasonable search and seizure, and not otherwise a violation of Article IV of the amendments to the Constitution of the United States.

6. That the order of the Commission is a lawful exercise of power lawfully conferred.

STIPULATION.

There was a stipulation in the case (R., 12–14) which recited an amendment of the order of the Commission of March 3, 1908, which amendment was made

on the 15th of August, 1908, and which changed in some respects the form of the report required by the Commission. The stipulation provided further for staying proceedings in like cases against other carriers, and that, pending the final disposition of this case, none of the litigant carriers should be required to make the reports called for by the order of the Commission, and should not be required to defend any prosecution on account of any omission to make reports during the period anterior to the final disposition of this suit.

DECREE.

The case was expedited for hearing (R., 11), and, upon the hearing, the demurrer to the bill was sustained, the bill dismissed, and the case was brought here by appeal (R., 15–16).

In the briefs filed by the complainant some objections to the validity of the act are made in addition to those suggested in the bill. The various contentions made in the bill and the briefs are that—

1. The act is invalid because it applies to intrastate as well as to interstate railroads and employees.

2. The power to require the reports called for by the order in question could not be delegated by Congress to the Commission.

3. Congress has not in fact delegated the power which the Commission sought to exercise in making the order.

4. The order was made without according a hearing to the carriers.

5. The act of March 4, 1907, did not take effect until March 4, 1908, and so the order of the Commission, having been formulated the day before, is void.

6. The order, because of the labor and expense involved in complying therewith, deprives the complainant of its property without due process of law.

7. The order applies to cases to which the act does not extend, in that it requires reports of excess service which incurs no penalties, and when there has been no excess service at all it requires a report of that fact.

8. The order compels self-incrimination by officers and employees of the company.

9. It is void as a process of unreasonable search and seizure.

Of these matters in their order.

ARGUMENT FOR THE GOVERNMENT.

I.

The law in its general scope and purpose of promoting the safety of travel and transportation upon railroads by limiting the hours of service of employees thereon is a valid exercise of the power of Congress to regulate commerce among the several States.

Johnson v. *Southern Pacific Co.*, 196 U. S., 1 (Safety Appliance).

Employers' Liability Cases, 207 U. S., 463.

The reports of the Interstate Commerce Commission and messages of the President show clearly that the limitation of the hours of service of employees is a

reasonable means of promoting the safety of railroad travel and transportation.

It is matter of surprise that legislation should be necessary to limit such service to 16 consecutive hours or to 16 hours out of any 24.

We do not, indeed, understand the company as challenging broadly the authority of Congress to limit, as it has done, the hours of service of persons engaged in the movement of trains in the course of commerce between the States, but that it assails the act only as extending to State as well as interstate travel and transportation.

By its terms the act applies only to carriers "engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States."

Very clearly the carriers here defined are within the jurisdiction of Congress for purposes of regulation.

As to employees, it is provided that "the term 'employees' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train."

The act then applies and is limited to interstate carriers and their employees engaged in or connected with the movement of some train.

There is nothing in the terms of the act making it applicable to the movement of a train which is not engaged in *and the movement of which in no wise affects* the safe conduct of interstate travel and transportation.

There is no averment in the bill of complaint showing that the act in fact applies to travel and transportation exclusively intrastate, and much less is there any averment that the act applies to any travel or transportation *which in no wise affects the safe conduct of interstate travel and transportation.*

The reply brief for the railroad company for the first time presents the contention that the act applies to purely State travel and transportation, but it suggests no facts upon which to predicate the contention.

It is a fact of common knowledge that much the greater portion of the business done upon the railroads of the country is interstate, and that State and interstate travel are conducted indiscriminately upon the same trains.

There is nothing before this court, no fact of common knowledge, no provision of the act, no averment of the bill of complaint, suggesting that there is upon any railroad of the country employed in interstate commerce any train movement which does not affect the safety of interstate travel and transportation, and

surely an act of Congress will not be invalidated because of facts merely imagined and not shown to exist.

It is not even alleged that the complainant, or any other railroad company in the country, operates any trains exclusively in State travel and transportation, but if we may assume that there are such trains it can not be further assumed that their operation does not affect the safety of interstate trains.

The very contrary is obviously true. Any train on the road—State or interstate—unless properly conducted, is a menace to every other train—State or interstate—out on the same part of the road at the same time.

The engineer, fireman, conductor, or brakeman, exhausted by excessive hours of service, and so unequal to the proper discharge of his duty, may be the means of involving an interstate train in wreck and ruin, although he himself is engaged upon a State train.

Collision of an interstate train with a State train, if such there be, is just as probable, and just as disastrous when it occurs, as collision with another interstate train.

The safe operation of trains over a railroad as affected by the watchfulness and efficiency of those conducting that operation is a single subject, absolutely indivisible as between the different classes of trains moving over the road. It would be as well to secure the safety of passenger trains by appropriate

regulations, while leaving freight trains to run on the same track without rule, as to secure the safety of interstate trains by regulations not applicable to State trains running over the same road at the same time.

If Congress may do anything toward securing the safety of interstate travel and transportation, it may do everything appropriate thereto. It is not confined to halfway measures, which may guard against some perils and leave others just as great, and indeed of the same kind, not guarded against at all.

The subject is one like quarantine, in which the State and Nation alike are interested. In the absence of national regulations, or such regulations existing, consistently therewith, the State may prescribe regulations of its own. But the authority of Congress is comprehensive of the whole subject, and because it is so comprehensive it is, in any case of conflict, paramount. Dealing with this question in *Morgan* v. *Louisiana* (118 U. S., 455, 464), this court said:

> It may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all State laws on the subject will be abrogated, at least so far as the two are inconsistent.

This was quoted and approved and the doctrine applied to a regulation of freight charges in *Gulf, etc., Railway* v. *Hefley* (158 U. S., 98).

The very act here in question was under consideration in *State* v. *Chicago, Milwaukee & St. Paul Railway Company* (136 Wis., 407), and was held to be paramount to State legislation on the same subject. Discussing the respective powers of the State and National Governments, the court said (p. 412):

> The Supreme Court of the United States, in *Covington & C. B. Co.* v. *Kentucky, supra,* has classified that field into three classes of legislative acts: The first, where the States have plenary power and Congress has no right to interfere, which concern the strictly internal commerce of the State, and, while the regulation may affect interstate commerce indirectly, its bearing is so remote that it can not be termed in any just sense interference. The second includes cases of what may be termed "concurrent jurisdiction," where the States may act in the absence of Congressional action. Obviously this field must be one where Congress has right and power to act if it sees fit, but where some restraint and regulation is necessary, and the authority therefor is deemed to be conceded to the States pending nonaction of Congress. The third is the class where, from the very intimacy with, and directness of effect upon, interstate commerce of any legislative action, and national scope of the subject of legislation, it is presumed that the refraining of Congress from promulgating any regulations is intended to declare a policy that the subject shall be free from regulation.
>
> Pretty obviously, under the decisions of the Supreme Court of the United States, the

act we are considering must fall in the second class.

The court held that the language of the State act extended it to interstate commerce, and, beyond this, held that the impracticability of limiting it to domestic commerce precluded belief in any such legislative purpose. The court said as to this (pp. 418, 419):

> * * * That impracticability is largely shown by facts alleged in the answer, but also by facts which are matter of common knowledge. The direction and dispatching of every train on an interstate railway necessarily involves knowledge in the train dispatcher of all other trains which are in the same vicinity at the same time, and also ability to control such other trains. An interstate train from Milwaukee to Chicago can not be safely forwarded, if, under the direction of a separate employee, a local train may be moving between Milwaukee and Racine over the same track at the same time, or nearly so. The very switching at local stations must be within the knowledge and under the control of him who is to decide upon and direct the most important of interstate transportation. Obviously division of authority over these subjects would be fraught with great perils and delays to both kinds of transportation. Hardly any act of a train dispatcher on a busy railroad can be conceived which does not affect both interstate and domestic commerce. He can not move or stop the most distinctively local train without affecting the interstate train, or *vice versa*. No extra or special can be put

> on the division without adjustment of other trains. Of course, also, every interstate train carries some purely intrastate freight or passengers. Many purely domestic trains carry some freight or passengers in transit to extrastate destination. It would seem that any severance of control over State from interstate trains involved so much of confusion and probability of danger, and its possibility even is so doubtful and experimental, that no legislature would absolutely precipitate it without careful consideration, nor without providing in the act for the event of the failure of such experiments. For this reason as well we are convinced that the legislative purpose involved what the legislative words include, the regulation of services of all operators, and would in no wise be satisfied, even in part, by a restriction to those whose acts affect only domestic commerce, if indeed there are any such.

As the terms of the act limit it to interstate carriers, and as no state of facts is suggested to which it can have practical application, in which interstate commerce is not involved, it is clearly an exercise of the constitutional power of Congress to regulate commerce among the several States.

II.

Congress having prescribed regulations to secure the safe conduct of interstate travel and transportation, in the exercise of the same power could prescribe the means of enforcing those regulations. Information as to the conduct of the carriers under the regulations would be necessary to the enforcement

of them, and reports from the carriers would be a convenient means of getting that information in the first instance. This and all other work incident to the enforcement of the law is administrative in character and is properly committed to the executive department of the Government.

III.

Has the Commission been given the authority to require these reports?

The hours-of-service act provides (34 Stat., 1417):

> SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act.

The Commission may, then, do whatever is appropriate to the execution and enforcement of the law.

To ascertain how it is observed is appropriate to its execution and enforcement.

In order to obtain this information it may then exercise any power which has been granted to it, since every such power is "extended to it in the execution of this act."

What are these powers?

Section 12 of the interstate commerce act as amended February 10, 1891 (26 Stat., 743, c. 128), provides:

> SEC. 12. That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers

subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Section 20 of the same act, as amended June 29, 1906 (34 Stat., 584, 593), provides:

SEC. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, and from the owners of all railroads engaged in interstate commerce as defined in

this act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders: the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

85917—11——2

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the Commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided.

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this act.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this act.

* * * * *

All of the enumerated powers, so far as they are appropriate, are extended to the Commission for the execution of the hours-of-service act.

The Commission may then,

1. Inquire into the management of the business of the carrier and keep itself informed as to the manner and method in which the same is conducted.

2. Obtain from the carriers full and complete information necessary to enable the Commission to perform its duties, which, here, is to execute and enforce this act.

3. Request district attorneys of the United States to prosecute violations of the act.

4. Require the attendance and testimony of witnesses and the production of books and papers in any investigation it may make as to the observance or violation of the act.

5. Require annual reports, under oath, from the carriers covering the subject matter of this act.

6. Require monthly reports or special reports within a specified period.

7. Prescribe the forms of records and memoranda to be kept by the carriers and have access to these at all times.

Plainly here is plenary authority to the Commission to get the information pertinent to the purposes of the act, and to get this information either by its own inquiry or to obtain it from the carrier.

The subject of the act is one which requires constant supervision and current information. The purpose of the law is preventive. It is to secure safe

operation of the railroads and to prevent accidents. If the Commission is to aid in this purpose it must know what is being done. It must see to it that the hazard against which the law is aimed is not being incurred.

The case is clearly distinguishable from that of *Harriman* v. *Interstate Commerce Commission* (211 U. S., 407). In that case the court said as to the scope of its decision (p. 422):

> All that we are considering is the power under the act to regulate commerce and its amendments to extort evidence from a witness by compulsion. What reports or investigations the Commission may make without that aid but with the help of such returns or special reports as it may require from the carrier, we need not decide.

Here the Commission is not making a vague, general inquiry into the conduct and affairs of the carriers, but is inquiring specifically concerning a matter which Congress in a very special way has subjected to its supervision. It has "the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created." One of these duties and objects particularly designated by law is the enforcement of the hours-of-service act. The particular mode of obtaining this "full and complete information" from the carrier is not prescribed, and is therefore left to the reasonable discretion of the Commission. Unless

some constitutional right of the carrier is violated, which will be considered hereafter, a monthly report under the sanction of an oath seems to be an apt method to accomplish the purpose.

Whether under the original hours-of-service act the Commission could require this report has become a moot question.

During the pendency of this suit (on June 18, 1910) section 20 of the interstate commerce act was amended (36 Stat., 556), and it now provides, among other things, that:

> * * * The Commission shall also have authority by *general or special orders* to require said carriers, or any of them, to file monthly reports of earnings and expenses, and *to file periodical or special, or both periodical and special,* reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed *or which it is required to enforce;* and such periodical or special reports shall be under oath whenever the Commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided.

As the law now stands it is by the express terms of the hours-of-service act made "the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act," and by the express terms of the interstate commerce act it is empowered "by general or special orders to require said carriers, or

any of them, * * * to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed *or which it is required to enforce;* and such periodical or special reports shall be under oath whenever the Commission so requires."

As to the past, the complainant is fully protected by the stipulation herein, which is that pending the final disposition of this cause the complainant and other carriers "shall not be required to make the reports required by the orders here in question, and that at no time shall they be required to defend any prosecution on account of any omissions to make such reports during the period anterior to such final disposition." (R., 13, 14.)

The relief, pending the suit, prayed for in the bill of complaint was thus secured by the stipulation and there remains only the prayer that the order of the Commission be set aside and annulled. We submit that this should not be done if the order is now valid, even though invalid when first formulated.

IV.

The order, it is said, was made and promulgated without according a hearing to the complainant or any other carrier. This, however, is not a matter in which any carrier was entitled to a hearing. It dealt with no particular case and adjudged nothing with respect to the rights of any particular carrier. It simply prescribed a mode of procedure, and if

within the power of the Commission to do at all it could be done without a hearing, standing in that respect upon the footing of a rule of court or the regulation of a department.

V.

It is suggested, also, that the order is invalid because made on the 3d day of March, 1908. The act was approved March 4, 1907, and was to take effect and be in force one year thereafter. The Commission formulated its order on the 3d of March, 1908, but did not promulgate it until some time thereafter; just when is not disclosed, but certainly not before March 4, 1908. By its terms the order was not immediately effective, and the reports under it were to begin with the month of April, 1908, when the law had been in force for a month. A technicality so attenuated as this will not support the jurisdiction of a court of conscience.

VI.

Because there is some labor and expense involved in making the reports, the order is challenged as depriving the complainant of its property without due process of law. But if the requirement of the report is itself a proper one, the expense incident to it is a proper charge upon the company. When a business is of such nature as to call for public supervision, the expense of that supervision is usually and almost universally charged in some way to the business. In *St. Louis Cons. Coal Co.* v. *Illinois*

(185 U. S., 203) the court approved the general principle that a State may appoint mining inspectors and provide for their payment by the owners of mines. In *Charlotte, etc., R. R. Co.* v. *Gibbes* (142 U. S., 386) a statute of South Carolina was held to be valid which required the salaries and expenses of the State Railroad Commission to be borne entirely by the railroad companies. In *Nashville, etc., Railway Co.* v. *Alabama* (128 U. S., 96) a statute of Alabama was sustained which required a physical examination of trainmen from time to time and charged the expense of such examination to the company in whose service the trainmen were engaged. The object of that act was, as here, to protect the traveling public against accidents, and there, as here, the expense occasioned by the means employed was imposed upon the company.

VII.

It is further objected that the order calls for too much information—more than the Commission is entitled to. The act prescribes that in case employees are required or permitted to go, be, or remain on duty contrary to the terms of the act, a penalty is incurred, which is to be recovered by suit brought by a United States attorney, and then follows this proviso:

> *Provided*, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in

charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this act shall not apply to the crews of wrecking or relief trains.

The report which the company is required to make shows the service in excess of the time limits prescribed by the act, no matter what the cause or occasion of the excess service. If a trainman has served more than 16 hours because of a casualty, or accident, or act of God, or some unforeseen contingency, or on a wrecking or relief train, the report must show all this, and this, it is contended, the Commission has no right to require. The order also provides that if there has been no excess service the report shall state that fact, and this requirement is also said to be beyond the power of the Commission.

If the report called for anything less than it does, it would be of little value. The law prescribes a maximum term of service by certain employees during any period of 24 hours. It penalizes the company if it requires or permits service in excess of this term, unless the excess service is occasioned by accident, etc. The Commission is entitled to information as to all the facts of excess service and to use that information for the guidance of its own conduct in the execution and enforcement of the law. It would not promote the beneficent purpose of the law if the report left the company to judge for itself whether a case of excess service was excusable under the law and to make return only of such cases as it admitted to be

inexcusable. As to reporting the fact that in any month there had been no excess service, that is very essential, for if in such case the company was not required to report the Commission could never know whether the company was rendering perfect obedience to the law or disregarding it altogether. A report of no excess service, where that is the fact, is, if not a report of excess service, at least a report as to excess service. In requiring it to be made the Commission followed the example of completeness set by Horrebow in his Natural History of Iceland, which contains a chapter on snakes in the single line, "There are no snakes in Iceland."

VIII.

The objection that the order requires self-incrimination of officers or employees of the company is not well founded in fact or in law.

The report required by the order is from the official of the company to whom the hours of service of employees are reported by the company's subordinate officers and agents. That official is not the one responsible for the excesss service. The company has the information desired. It knows, must know, how long and during what hours its telegraph operators and train dispatchers are engaged. It knows, must know, when a crew goes out with a train and when that crew is relieved. If that crew is out overtime, it knows the occasion. Without such knowledge the road could not be operated. The compilation of such facts by the secre-

tary or like official and report of it to the Commission does not and can not involve self-incrimination by those responsible for the excess service.

Giving this information to the Commission may, indeed, expose the responsible persons to prosecution for the penalties, but they have no constitutional right to be shielded by the company against the consequences of their wrongdoing.

IX.

Hale v. *Henkel* (201 U. S., 43) settles the case so far as possible self-incrimination by the corporation is concerned. The doctrine there announced applies with peculiar force in a case like this, involving a corporation engaged in the conduct of a business so strongly impressed with a public interest as that of a common carrier. Supervision and regulation of such a business can not be made effective if those engaged in it may withhold information as to their conduct from the public representatives. Whenever a business is of such character that men may not engage in it as of natural right, they may be, and are, required to give account of themselves. Banks and insurance companies must make reports, and those reports may disclose violations of law if any have been committed. A bank may be required to report the rate of interest at which it makes its loans, and if in any case it has exacted a usurious rate, its report will disclose the fact and expose it to the penalties prescribed by the law. In prohibition States those who are authorized by the law to sell liquor for the per-

mitted purposes must keep a record of their sales and report them to some public official, and undoubtedly these reports furnish evidence of illegal sales if any have been made. Everywhere the statutes provide for publicity in matters of public interest. Nowhere is the man who undertakes a function in the nature of a public trust excused from rendering an account of his conduct in that trust from time to time on the plea that such an account will expose him in the event that he has violated his trust.

Here is a railroad company which undertakes the carriage of men, women, and children by agencies of a dangerous nature. When it assumed this task it agreed to use every means which makes for safety, and, above all, to obey the requirements which the law might impose upon it. The requirement here in question is one of publicity in what greatly concerns the public—the safety of railroad travel. That it may involve self-incrimination as to the corporation does not invalidate it and neither is it invalid as being in the nature of a search and seizure, and unreasonable because of its requirements. The analogy of the Commission's order to a search warrant is not very close, but dealing with it as such it violates no constitutional guaranty. There is good reason for requiring the information, and it is that the safety of travel will be promoted thereby. That is in the nature of probable cause. The warrant is specific. In this case it is addressed to the Baltimore & Ohio Railroad Company, and it calls for specific informa-

tion which is contained in the records of the company made in the ordinary course of its business. This meets the requirements of particular description of the place to be searched and of what is to be seized.

There is really but one question involved in this case and that is the validity of the law considered with respect to the purpose of securing the safety of interstate travel and transportation. If it is within the power of Congress to limit the continuous service of men operating railroad trains to sixteen hours and to require that after so long a service they shall not serve again until they have had at least ten hours of rest, then every other provision of the law is valid, because each and all of them are but apt and appropriate means of attaining its beneficent purpose.

It is respectfully submitted that the decree of the Circuit Court should be affirmed.

F. W. LEHMANN,
Solicitor General.

MARCH, 1911.

○